

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**February 4, 2014**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP1129-CR**

**Cir. Ct. No. 2011CF5559**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**KERRY ERIC BURRIS,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Kerry Eric Burris appeals from a judgment of conviction, entered upon his guilty plea, on one count of burglary. Burris also appeals from an order denying his postconviction motion to withdraw his plea. Burris contends he was unaware of the elements of burglary when he entered his

plea; therefore, the plea was not knowing, intelligent, and voluntary, entitling him to withdraw it. The circuit court concluded, after an evidentiary hearing, that Burris understood the elements notwithstanding any defects in the plea colloquy. We agree with the circuit court and affirm the judgment and order.

¶2 Burris was charged with one count of burglary (home invasion) and one count of felony bail jumping. Pursuant to a plea agreement, he pled guilty to a reduced charge of burglary to a building or dwelling, and the bail jumping charge was dismissed and read in. The circuit court accepted the plea and imposed a sentence totaling nine years' imprisonment.

¶3 Burris filed a postconviction motion under *State v. Bangert*, 131 Wis. 2d 246, 389 N.W.2d 12 (1986), seeking to withdraw his plea. He alleged a defect in the plea colloquy because the circuit court had not reviewed the elements of burglary with him so as to sufficiently ensure Burris understood the nature of the charges against him. Instead, the circuit court only asked counsel whether he had reviewed the elements with Burris. The circuit court granted a hearing on the postconviction motion. Both Burris and trial counsel testified. The circuit court concluded that the defect in the plea colloquy notwithstanding, Burris understood the elements of burglary, and it denied his motion to withdraw the plea.

¶4 A defendant is entitled to a hearing on a *Bangert* motion to withdraw a plea if the motion makes a *prima facie* showing that the circuit court's plea colloquy failed to conform to WIS. STAT. § 971.08 (2011-12) or other mandated procedures and if the motion adequately alleges that the defendant did not know or understand the information that should have been provided at the plea hearing. See *State v. Brown*, 2006 WI 100, ¶2, 293 Wis. 2d 594, 716 N.W.2d 906.

Here, the State concedes that the evidentiary hearing was warranted, so we need not review the circuit court's decision to grant to the hearing.

¶5 “Once the defendant files a *Bangert* motion entitling him to an evidentiary hearing, the burden shifts to the State to prove by clear and convincing evidence that the defendant's plea was knowing, intelligent, and voluntary despite the identified defects in the plea colloquy.” *State v. Hoppe*, 2009 WI 41, ¶44, 317 Wis. 2d 161, 765 N.W.2d 794. In determining whether the State met its burden, we accept the circuit court's findings of historical and evidentiary facts unless clearly erroneous, but we independently determine whether those facts establish the defendant's pleas were knowing, intelligent, and voluntary. *Id.*, ¶45. The State is allowed to rely on the totality of the evidence, including evidence outside the plea colloquy transcript, to fulfill its burden. *Brown*, 293 Wis. 2d 594, ¶40.

¶6 Both trial counsel and Burris testified at the postconviction hearing. The circuit court concluded, based on counsel's testimony, that on one of his visits to see Burris at the House of Correction, they spent almost an hour together, “which would indicate ... a reasonable conclusion [counsel] went through – into details with the defendant.” Counsel testified that it was his customary practice to review elements of the offenses with his clients. Although on cross-examination he admitted he had “no specific recall” of doing so with Burris, the circuit court explained, “I think I have a right to rely on how an attorney does cases, his normal practices.” Counsel also indicated at the plea hearing that he had reviewed the elements of burglary with Burris, so at the postconviction hearing, the circuit court inquired whether counsel's memory at the plea hearing was likely better at the time of the plea hearing. Counsel answered affirmatively.

¶7 Burris testified that he did not recall whether counsel had reviewed the elements of the criminal offense by way of an elements sheet attached to the plea questionnaire, but said that he likely would have remembered if counsel had done so. The circuit court found that Burris was not credible. Further, it was established that Burris had been convicted of burglary at least four times previously. Accordingly, the circuit court concluded that Burris “knew what the elements were – of burglary even prior to meeting with [trial counsel].”

¶8 Based on the circuit court’s factual findings, we agree that Burris sufficiently understood the nature of the burglary charge to which he was pleading. Thus, the plea was knowing, intelligent, and voluntary notwithstanding defects in the colloquy, and the circuit court properly denied the motion to withdraw the plea.

*By the Court.*—Judgment and order affirmed.

This opinion shall not be published. See WIS. STAT. RULE 809.23(1)(b)5. (2011-12).

